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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

SIDNEY STREET,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF OF AMICUS CURIAE UNITED STATES FLAG FOUNDATION, INC.

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Interest of Amicus Curiae United States Flag Foundation, Inc.

Appellant Street attacks the constitutionality of New York General Business Law § 136(d) [formerly New York Penal Law § 1425, subd. 16(d)], deeming guilty of a misdemeanor "[a]ny person, who * * * [s]hall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon" the flag of the United States. The United States Flag Foundation is vitally interested in upholding this law and seeing that its purpose is achieved.

The United States Flag Foundation, Inc. is a tax-exempt, non-profit, patriotic and educational corporation organized under the laws of New York to promote the display of and respect for the flag of the United States and to encourage the study of the flag and American history. The present activities of the Foundation include: sponsoring and urging passage of legislation prohibiting public dishonor of the flag; advising individuals and organizations on the proper use and display of the flag; preparing and distributing literature and providing lectures on the history of the flag; lodging complaints against disrespectful or contemptuous use or representation of the flag.

Since the statute which appellant attacks here is intended to and does prohibit dishonor and disrespect to the flag, the United States Flag Foundation has an urgent interest in supporting the statute's validity.

Summary of Argument

New York's anti-flag desecration statute is constitutional on its face and as applied to the appellant here at least insofar as it provides that "Any person who * * * [s]hall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon [the United States flag] * * * by * * * act * * * [s]hall be deemed guilty of a misdemeanor." For such acts of public desecration of the flag are not "speech" within the meaning of the First Amendment but constitute conduct which may properly be regulated by the State.

Granting the New York Court of Appeals' premise that public acts of flag desecration are a form of "symbolic speech", the statute in question is nonetheless constitutional. For the people, represented by their State govern-

ment, have a sufficiently important interest in protecting the national flag from public disgrace to justify regulation of these acts, even though whatever communicative element may be inherent in such conduct is incidentally forbidden.

ARGUMENT

New York General Business Law § 136(d), insofar as it prohibits acts of public desecration of the United States flag, is constitutional since it does not violate the free speech protections of the First and Fourteenth Amendments either on its face or as applied to appellant here.

A. *The Public Burning of the United States Flag and Other Conduct Which Publicly Disgraces the Flag Is Not "Speech" Within the Meaning of the First Amendment.*

In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), this Court recently said: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." With respect to the United States flag, the variety of conduct so labeled could be limitless indeed: burning the flag, spitting on it, forming it into vulgar and degrading shapes, urinating or defecating upon it, etc. What idea does such bizarre conduct convey? The actor is "mad at something"? But what? Our Government's Vietnam policy? The assassination of a President, a Senator, a prominent civil rights leader?

Conduct which desecrates the flag, in our view, conveys no meaningful idea. Invariably, to be meaningful the conduct must be explained verbally, just as O'Brien explained

his burning of his draft card to the FBI men and to the jury (391 U.S. at 369-370), and just as Sidney Street, the appellant here, explained his burning of an American flag to the crowd and to the arresting officer (17a, 24a). But the prohibited conduct itself cannot rationally be held to be "speech". Any argument to the contrary

> "has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and *however* and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in * * * *Cox* v. *Louisiana*, [379 U.S. 536 (1965)] * * *. We reject it again."

Adderley v. *Florida*, 385 U.S. 39, 47-48 (1966) (emphasis added).

New York General Business Law § 136(d) is applicable to all persons within New York and is narrowly drawn to prohibit certain types of clearly-defined conduct. Insofar as it does so, it does not violate the free speech protections of the First and Fourteenth Amendments and is constitutional on its face and as applied to appellant here.

B. *There Is a Sufficiently Important Governmental Interest in Protecting the United States Flag from Desecration to Justify Incidental Limitation on Whatever Elements of "Speech" May Be Inherent in the Acts of Desecration Prohibited by the Statute.*

In this case, the New York Court of Appeals assumed, as this Court assumed in *O'Brien*, that the act of burning a United States flag (or a draft card) contained a "communicative element * * * sufficient to bring into play the First Amendment", but that "it does not necessarily follow that

the destruction of a registration certificate [or an American flag] is constitutionally protected activity." Compare *United States* v. *O'Brien, supra,* 391 U.S. at 376, with *People* v. *Street,* 20 N.Y. 2d 231, 234 (1967). Rather,

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

United States v. *O'Brien, supra,* 391 U.S. at 376-377.

The New York Court of Appeals held that the substantial State interest which justifies the statute here in question is the State's interest in preventing breaches of the peace, which public indignities to our flag are likely to provoke. *People* v. *Street, supra,* 20 N.Y. 2d at 236-237. True, this may be *an* interest of the State which justifies a prohibition on conduct publicly desecrating the flag, and a consideration which has particular importance in the context of this case. But we submit that the truly paramount State interest which vindicates New York's anti-flag dese-

cration statute is the urgent concern of the people of New York for the protection from dishonor of the symbol of our nation—its liberty and its ideals, the standard which represents our country's past, its present, its hopeful future.* As the first Mr. Justice HARLAN said in *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907):

> "For [the United States] flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government."

This is, we submit, the most important and substantial governmental interest furthered by the salutary statute now under attack, for a government *is* the people it governs. Nor can there be any doubt that this governmental interest is totally unrelated to the suppression of free expression; there are any number of constitutionally-protected ways for a person to make known his dissent or protest to any aspect of our government or society. The restriction on speech—if any—imposed by the New York statute is the minimum necessary to the furtherance of the people's interest. *Cf. United States* v. *O'Brien, supra*, 391 U.S. at 377.

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* The intent of the New York State Legislature in passing what is now General Business Law § 136(d) was to protect the American flag from desecration and to insure its respectful use, and not to prevent breaches of the peace. *People* v. *Picking*, 23 N.Y.S. 2d 148, 149 (Magis. Ct. N. Y. City 1940) (not officially reported), *aff'd mem.* 263 App. Div. 366 (1st Dep't 1942), *aff'd mem.* 288 N.Y. 644 (1942), *cert. denied* 317 U.S. 632 (1942), *reh. denied* 317 U.S. 708 (1942); ch. 54, [1917] Laws of New York 106 (caption); 1943 Report of N. Y. Att'y Gen. 90-91; 1941 Report of N. Y. Att'y Gen. 465; 51 N. Y. State Dep't Reports 240 (1934).

Appellant relies on *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943), in an attempt to distinguish the present case from the principles enunciated in *O'Brien*. (Brief, pp. 20-25.) But his reliance on *Barnette* is misplaced. As appellant himself recognizes (Brief, pp. 23-24, 25), *Barnette* is concerned with governmentally-enforced veneration of the United States flag, and turns on the proposition that

> "no official • • • can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642.

But here, appellant is not being forced to love his country or his country's flag or to pledge allegiance to either. No compulsion is involved. This statute does not force respect, any more than it prohibits dissent. Unlike the statute struck down in *Barnette*, it does not compel salutes to the flag or any other action. Appellant is not being made to *do* anything; he is merely prohibited from doing certain clearly, reasonably and narrowly defined acts which constitute desecration of our national flag. Surely the Constitution is not dedicated to the proposition that all men can unqualifiedly do as they please.

CONCLUSION

New York General Business Law § 136(d) is constitutional on its face and as applied to appellant here insofar as it makes unlawful conduct which dishonors or desecrates the flag of the United States of America.

Respectfully submitted,

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Dated: September 13, 1968